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No. 91-1593

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANCISCO JAVIER MUNOZ-ROMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's multiple convictions or sentences under 18 U.S.C. 922(g)(1) and (5) violated the Double Jeopardy Clause.

2. Whether the court of appeals awarded petitioner adequate relief for the wrongful imposition of sentences under both 18 U.S.C. 922(g) and 18 U.S.C. 924(e).

3. Whether the evidence at trial was sufficient to support petitioner's firearms and money laundering convictions.

4. Whether petitioner was denied effective assistance of counsel at trial.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 64-103, is reported at 947 F.2d 170.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1991. A petition for rehearing was denied on December 3, 1991. Pet. App. 62. The petition for a writ of certiorari was filed on January 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of two counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841; two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); two counts of being an illegal alien in possession of a firearm, in violation of 18 U.S.C. 922(g)(5); one count of possessing a firearm after three convictions for serious drug offenses, in violation of 18 U.S.C. 924(e); and three counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A). He was sentenced to 240 months in prison, to be followed by five years of supervised release.[1] The court of appeals affirmed the convictions but vacated a portion of petitioner's sentence. Pet. App. 102.

1. Beginning in 1987, petitioner was the subject of a narcotics investigation by state and federal law enforcement authorities. On August 29, 1988, James Linberg, who had previously purchased cocaine from petitioner, agreed to cooperate with the police in arranging a controlled purchase of cocaine from petitioner. Officers placed a wireless microphone on Linberg to record his conversations with petitioner. Linberg arranged to meet petitioner for the purpose

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[1] Petitioner was sentenced to 240 months in prison and five years of supervised release on his narcotics and money laundering convictions. He was sentenced to 22 months in prison and three years of supervised release on his convictions for being a felon in possession of a firearm and for being an illegal alien in possession of a firearm. Finally, he was sentenced to a term of 180 months in prison, to be followed by three years of supervised release, for possessing a firearm following three convictions for serious drug offenses. The prison terms and the periods of supervised release were all made to run concurrently.

of buying cocaine. Over the next two days, Linberg purchased a total of 14 grams of cocaine from petitioner. Pet. App. 65; Gov't C.A. Br. 6-8.

On September 14, 1988, law enforcement agents obtained warrants to search three properties in Houston, Texas, that were owned or rented by petitioner. Pet. App. 65-67. In their search of a house that petitioner rented on East Warren Street, the officers discovered (a) approximately $59,000 in cash hidden throughout the house; (b) a revolver and several shells in a suitcase located in the bathroom; (c) drug paraphernalia; and (d) drug ledgers. Pet. App. 66; Gov't C.A. Br. 9-10.

Federal agents executed a second search warrant at an apartment registered to petitioner on Sherwood Avenue. During their search, the agents found (a) a revolver hidden between a mattress and box spring; (b) several bags containing money and jewelry buried on the grounds of the apartment complex; and (c) several items of drug paraphernalia. Pet. App. 66-67; Gov't C.A. Br. 10-12. The same day, agents searched petitioner's house on North Wheeler Street. They seized various income tax returns of petitioner and his wife. Gov't C.A. Br. 12.

2. On appeal, petitioner argued that the Double Jeopardy Clause was violated because, for each firearm at issue, he was separately convicted of being a felon in possession of a firearm and an illegal alien in possession of the same firearm. The court of appeals noted that petitioner was claiming, in effect, that for each weapon he had been indicted on multiple counts for a single offense—unlawful possession of a firearm. Pet. App. 72-73. The court of appeals rejected that claim.

At the outset, the court noted that petitioner did not raise the double jeopardy or multiplicity issue in

the district court. The court therefore held that petitioner had waived his claim respecting multiplicitous convictions. The court further held, however, that petitioner's waiver did not extend to his multiple sentences, and that he could therefore raise his claim regarding multiplicity of sentences for the first time on appeal. Pet. App. 74.

The court noted that the challenge to the multiple sentences imposed for violations of 18 U.S.C. 922(g)(1) and 18 U.S.C. 922(g)(5) turns on whether Congress intended to authorize multiple punishments under those two statutory provisions for the same criminal act. The court concluded that the plain wording of the statute permits the multiple punishments at issue, and that the legislative history does not alter that conclusion. Citing *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court noted that each offense—being a felon in possession of a firearm and being an illegal alien in possession of a firearm—requires proof of a fact that the other does not, and concluded that the imposition of separate punishment for each offense was therefore authorized. Pet. App. 71-83.

The court of appeals also rejected petitioner's claim that there was insufficient evidence to support his convictions for possessing the two firearms and for money laundering.[2] The court first concluded that the jury could reasonably infer from the evidence that petitioner constructively possessed the firearms found at his two residences. Pet. App. 86-87. The court then sustained petitioner's convictions on the three counts of money laundering in connection with

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[2] Because petitioner had moved for acquittal only at the conclusion of the government's case, and not again at the end of trial, the court evaluated petitioner's claims to determine whether there had been "a manifest miscarriage of justice." Pet. App. 84.

the purchases of a house, a truck, and an automobile. Petitioner claimed that the government had failed to show that those purchases were made with the proceeds of unlawful activity, arguing that the government had impermissibly rested its case exclusively on proof of his limited legitimate income. The court, however, noted that the government had shown not only that petitioner had limited legitimate sources of income, but also that he had engaged in drug trafficking and had stashed large sums of money at his residences. The court concluded that the jury was entitled to reject petitioner's efforts at trial to explain the large sums of cash that he used to make his purchases. Pet. App. 87-92.

The court of appeals declined to address petitioner's claim of ineffective assistance of counsel, because petitioner did not present that claim to the district court. The court of appeals was therefore unable to evaluate the claim properly on the record before it. The court made clear, however, that its decision was without prejudice to petitioner's right to raise his claim in a motion for collateral relief under 28 U.S.C. 2255. Pet. App. 93-94.

Finally, petitioner contended that he should not have received both a 22-month sentence under 18 U.S.C. 922(g)(1) and an enhanced 180-month sentence under 18 U.S.C. 924(e) for the same underlying possession conviction. Although petitioner failed to raise that claim in the district court, the court of appeals held that the district court had committed plain error by sentencing petitioner under both provisions. The court of appeals therefore vacated the sentence that

was imposed under Section 922(g)(1).[3] Pet. App. 100-103.

ARGUMENT

1. Petitioner renews his contention that for each firearm at issue he was improperly convicted twice for the same offense, in violation of the Double Jeopardy Clause. Pet. 8-19. He contends that his convictions as a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), and as an illegal alien in possession of the same firearm, in violation of 18 U.S.C. 922(g)(5), violated double jeopardy principles by penalizing him more than once for possessing the same firearm.

Because petitioner did not raise this issue in the district court, the court of appeals correctly held that petitioner had waived his double jeopardy challenge to his convictions under Sections 922(g)(1) and 922(g)(5). The only issue the court of appeals reached—and thus the only issue presented in this Court—is whether the district court properly imposed separate sentences on those counts. Because the terms of imprisonment imposed on those counts were concurrent, petitioner's prison term was not affected by the entry of separate sentences on the Section 922(g)(1) and Section 922(g)(5) counts; thus, with respect to his prison terms, petitioner did not suffer the "cumulative punishment" that the Double Jeopardy Clause forbids. The sentences on the Section 922(g)(1) and 922(g)(5) counts, however, were cumulative with respect to the $50 special assessment imposed under 18 U.S.C. 3013 on each count.

" [T]he question whether punishments imposed by a court after a defendant's conviction upon criminal

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[3] Petitioner did not dispute the validity of the sentence imposed under Section 924(e). Pet. App. 100.

charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Whalen* v. *United States*, 445 U.S. 684, 688 (1980). We agree with petitioner that Congress did not authorize the imposition of cumulative punishments for violating Sections 922(g)(1) and 922(g)(5) through the possession of a single firearm. It is true that each of those provisions requires proof of an element that the other does not, and that it is therefore presumed that Congress intended to allow cumulative punishments for each offense. See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). That presumption, however, may be overcome by "a clear indication of contrary legislative intent." *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981); see *Garrett* v. *United States*, 471 U.S. 773, 779 (1985) (*Blockburger* test must give way to "a plainly expressed contrary view on the part of Congress").

We believe that the language and structure of Section 922(g) disclose Congress's clear intent not to impose cumulative punishments when the same incident violates two subdivisions of subsection (g). The two subdivisions at issue here are found in a single subsection of a statute that prescribes a single penalty for all of those subdivisions. See *United States* v. *Winchester*, 916 F.2d 601, 605 (11th Cir. 1990) ("Under 18 U.S.C. 924(a)(2), Congress provided criminal penalties for the violation of subsection (g) of section 922, but it did not list separate penalties for the separate subdivisions of subsection (g).").[4] Moreover,

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[4] Of course, the fact that two charges are based on subdivisions of a single section or subsection of a statute is not dispositive of the question whether one offense or multiple offenses are intended. See, *e.g.*, *Callanan* v. *United States*, 364 U.S. 587 (1961) (conspiracy and substantive offense set forth in

"each subdivision of subsection (g) differs only in its requirement that the offender have a certain 'status' under the law." *Ibid.* And the statute's structure indicates that Congress sought "only to bar the possession of firearms by certain types of persons that it considered dangerous," and not to punish persons "solely for having a certain status under the law." *Id.* at 605-606. Indeed, to conclude otherwise would mean that "a convicted felon who is also a fugitive from justice, a drug addict, a 'mental defective,' and an illegal alien, could be sentenced to five consecutive terms of imprisonment for the same incident, namely, the possession of a firearm." *Id.* at 607.

Accordingly, because the text and structure of Section 922(g) clearly indicate that Congress did not intend to authorize multiple punishments under the various subdivisions of subsection (g), this Court should grant the petition, vacate the judgment, and remand the case for the court of appeals to direct the vacation of two of the sentences imposed under Section 922(g).

2. Petitioner also contends that the Double Jeopardy Clause was violated because, for one of the firearms he possessed, he was sentenced under both the felon-in-possession provision, 18 U.S.C. 922(g)(1), and the sentence enhancement provision, 18 U.S.C. 924(e), which applies when a felon in possession has had three prior convictions for violent felonies or

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18 U.S.C. 1951(a) are two separate offenses). In this case, however, the subsection in question, 18 U.S.C. 922(g), describes only a single unlawful act—possession of a firearm—which it then provides can be committed by persons having the status described in subdivisions 922(g)(1) through 922(g)(7). In that setting, it seems clear that Congress intended to describe only a single crime that could by committed by any person fitting into one or more of the seven qualifying categories.

serious drug offenses. Pet. 19-24. The government conceded below that Congress did not intend to permit sentencing to occur under both of those provisions for one offense. Gov't C.A. Br. 27. Observing that petitioner had not disputed the finding that he was subject to sentence enhancement under Section 924(e), the court of appeals left in place the sentence imposed under Section 924(e) and vacated the sentence imposed under Section 922(g)(1). Pet. App. 102.

In this Court, petitioner argues that the court of appeals should also have vacated the sentence under Section 924(e) and remanded the case to the district court for consideration of the facts relevant to the appropriateness of an enhanced sentence. But because petitioner has not disputed the validity of the enhancement under Section 924(e) either in the court of appeals or in this Court,[5] there was no reason for the court of appeals to remand the Section 924(e) sentence for further consideration. Thus, the court of appeals awarded petitioner complete relief by vacating the sentence imposed under Section 922(g)(1).

3. Petitioner renews his claim that the evidence was insufficient to support his convictions on the firearms and money laundering counts. Pet. 24-47. The standard ordinarily applicable to such claims is whether the evidence at trial could support any rational jury's finding of guilt beyond a reasonable

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[5] Petitioner claims in passing that the district court erred in sentencing him under Section 924(e) because there was insufficient evidence to sustain his underlying conviction under Section 922(g). Pet. 38. That claim, however, is not distinct from his general assertion that there was insufficient evidence that he possessed the firearms for which he was convicted. Because petitioner's insufficiency claims are without merit, see pp. 10-12, *infra*, his challenge to the sentence enhancement also does not warrant further review.

doubt. *United States* v. *Powell*, 469 U.S. 57, 67 (1984); see also *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). Because petitioner moved for a judgment of acquittal only at the conclusion of the government's case, and not at the close of trial, the court of appeals applied a stricter standard here—requiring petitioner to show that the record was so lacking in evidence that his conviction reflected a manifest miscarriage of justice. Pet. App. 83-84.[6] Under either standard of review, petitioner's convictions are adequately supported by the evidence.

a. Petitioner claims that the government failed to prove that he had constructive possession of the firearms found at his residences. Pet. 28-37. He does not challenge the court of appeals' standard for determining constructive possession of a firearm—that a defendant must have the intent and ability to exercise dominion and control over the weapon. Pet. 30 (citing *United States* v. *Smith*, 591 F.2d 1105, 1107 (5th Cir. 1979); *United States* v. *Donofrio*, 450 F.2d 1054, 1056 (5th Cir. 1971)). Rather, he claims that the evidence in this case does not support the verdict with respect to the firearms found at his residences.

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[6] Petitioner does not contest the Fifth Circuit's standard. Rather, he argues that his failure to renew his motion for a judgment of acquittal was attributable to ineffective assistance on the part of his attorney, and that the court should therefore apply the conventional standard of review. Pet. 26-28. The court of appeals, however, properly declined to rule on petitioner's ineffective assistance claim because it had not been raised below. Petitioner remains free to assert that claim in a motion under 28 U.S.C. 2255, but absent any finding by the lower courts with regard to petitioner's claim of ineffective assistance, it would not be appropriate for this Court to treat the case as if a timely motion for a judgment of acquittal had been made.

That contention is without merit. The government may prove constructive possession of contraband by "showing ownership, dominion, or control over the contraband itself or the premises or vehicle in which contraband is concealed." *Smith*, 591 F.2d at 1107 (quoting *United States* v. *Ferg*, 504 F.2d 914, 916-917 (5th Cir. 1974)); accord *United States* v. *Soto*, 779 F.2d 558, 560 (9th Cir. 1986), cert. denied, 484 U.S. 833 (1987); *United States* v. *McCoy*, 781 F.2d 168, 171 (10th Cir. 1985). With respect to the pistol found at petitioner's residence on East Warren Street, the evidence at trial showed that petitioner rented that residence, that he lived there, and that he was present when the police officers conducted the search that disclosed the firearm. The firearm, moreover, was found in a maroon suitcase in the bathroom of that residence, a location that was readily accessible to petitioner. And several days before the search, agents saw petitioner enter the East Warren Street residence carrying what appeared to be the same suitcase in which the pistol was later found.[7] Thus, a jury could rationally infer from the circumstances that petitioner had constructive possession of the weapon found in his East Warren Street residence. Gov't C.A. Br. 33-34.[8]

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[7] Petitioner suggests that the firearm belonged to his wife. Pet. 33. Although petitioner's wife testified that she owned the weapon, she originally told police that it did not belong to her. Gov't C.A. Br. 34. At trial, moreover, she was unable to identify which of two firearms belonged to her. *Ibid.* "Under these circumstances the issue of possession was for the jury." *McCoy*, 781 F.2d at 171.

[8] Contrary to petitioner's contention, Pet. 32, the decision in this case is not inconsistent with *United States* v. *Soto*, 779 F.2d 558 (9th Cir. 1986), cert. denied, 484 U.S. 833 (1987). In that case, the defendant was a mere passenger in a vehicle in which the police found firearms. *Id.* at 560. Thus, unlike in the

The same conclusion is warranted with respect to the gun that was found between the mattress and the box spring at petitioner's Sherwood Avenue apartment. Petitioner had personally paid the rent for the apartment several days before it was searched. Petitioner also admitted that he had buried money and jewelry on the property where the apartment was located. The apartment manager testified that she had never seen anyone but petitioner on the premises (although she believed that petitioner's wife was also authorized to use the apartment). Gov't C.A. Br. 33-34. Thus, the second firearm was located in an accessible place on premises over which petitioner exercised dominion and control. Under those circumstances, a finding of constructive possession was justified.[9]

b. Petitioner was convicted of three counts of money laundering in connection with the purchases of a residence, a truck, and an automobile. As the court of appeals held, in order to prove money laundering the government had to show that petitioner "(1) knowingly conducted a financial transaction, (2) which involved the proceeds of unlawful activity, and (3) with the intent to promote or further that unlaw-

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present case, there was no evidence in *Soto* that the defendant had dominion and control over the place where the weapons were located.

[9] Petitioner claims that the court's decision concerning the Sherwood Avenue apartment is inconsistent with *United States* v. *Beverly*, 750 F.2d 34, 37 (6th Cir. 1984), in which the court found the defendant's presence at someone else's residence insufficient to establish constructive possession of firearms found near the defendant at the residence. In contrast with *Beverly*, however, petitioner had dominion and control over the Sherwood Avenue apartment, which he rented.

ful activity."[10] Pet. App. 88. Petitioner does not dispute that formulation; rather, he claims only that the government failed to prove one element of the offense—that the financial transactions involved the proceeds of unlawful activity. Pet. 38-40. Petitioner claims that the government impermissibly relied on his limited income alone to prove that the money he used to purchase the home, truck, and car derived from illegal activity. Pet. 40-42.

Petitioner's contention is unsupported by the record. The court of appeals agreed with petitioner that proof of limited income alone would be insufficient to support a verdict of money laundering. Pet. App. 89 (citing *United States* v. *Blackman*, 897 F.2d 309, 317 (8th Cir. 1990)). The court, however, properly concluded that such proof would be sufficient when combined with additional evidence showing drug trafficking and petitioner's unexplained possession of large sums of currency. Pet. App. 89. The government introduced evidence showing that petitioner engaged in substantial drug trafficking activities during the period in which the financial transactions

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[10] The money laundering statute, 18 U.S.C. 1956, provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
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> > (A)(i) with the intent to carry on or promote the carrying on of specified unlawful activity * * *
> >
> > * * * * *
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property * * *, whichever is greater, or imprisonment for not more than twenty years, or both.

took place. Pet. App. 89-90; Gov't C.A. Br. 35-36. The jury also heard testimony that petitioner received large amounts of cash from his drug sales and that he kept it at his residence. In addition, the police found more than $60,000 in cash hidden at petitioner's East Warren Street residence and buried in the ground at his Sherwood Avenue apartment. Pet. App. 90-91; Gov't C.A. Br. 36.

Petitioner attempted to explain the large sums of cash by offering evidence that he had received a $38,000 inheritance from his mother and an $18,500 inheritance from a former employer. Pet. App. 91. However, the former employer's wife testified that she was unaware of any such bequest and that her husband had left nothing to her or to his children. *Ibid.* In addition, petitioner had previously given the police an inconsistent account of how much he had inherited from his family and had stated that either his father or mother had left him the money. *Id.* at 92. Petitioner was also unable to produce any documentation of his inheritance. Gov't C.A. Br. 36. The jury could rationally infer that the large sums of cash and the money for the purchases did not come from any inheritance.

In sum, the evidence showed that petitioner had limited legitimate income, that he had earned substantial amounts of money from drug trafficking, and that he had large amounts of unexplained cash. From that evidence, the jury was justified in concluding that the funds used to purchase the residence, the truck, and the car came from illegal sources.

4. Petitioner also contends that he was denied the effective assistance of counsel at trial, in violation of his Sixth Amendment rights. Pet. 47-58. However, petitioner did not raise that claim before the district court. The court of appeals declined to consider the

Sixth Amendment claim for the first time on appeal because there had been no opportunity " to develop the record on the merits of the allegations."[11] Pet. App. 93. The court, however, made clear that petitioner was free to reassert the claim in a proceeding under 28 U.S.C. 2255. Pet. App. 93-94. Because neither of the courts below has considered petitioner's claim of ineffective assistance of counsel, and because he is free to reassert his claims in a proceeding under 28 U.S.C. 2255, further review of petitioner's claim is unwarranted at this time.

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[11] The courts of appeals generally will not consider a claim of ineffective assistance of counsel that is raised for the first time on appeal. See, *e.g.*, *United States* v. *McDonald*, 935 F.2d 1212, 1220 (11th Cir. 1991); *United States* v. *DeFusco*, 930 F.2d 413, 415 (5th Cir.), cert. denied, 112 S. Ct. 239 (1991); *United States* v. *Gonzales*, 929 F.2d 213, 215 (6th Cir. 1991). While a court of appeals may consider such a claim if the record below is sufficient to permit evaluation of the claim on the merits, see *United States* v. *Wunder*, 919 F.2d 34, 37 (6th Cir. 1990), the court of appeals in this case properly concluded that the trial record did not provide a basis upon which it could "fairly evaluate" the merits of petitioner's claims. Pet. 94.

CONCLUSION

This Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for the court of appeals to direct the district court to vacate two of the four sentences imposed under Section 922(g). In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

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